...ME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1444

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

PLATO E. PAPPS
1300 Connecticut Avenue
Washington, D. C. 20006

L. N. D. WELLS, JR.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

Counsel for Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO

Of Counsel
MULLINAX, WELLS, MAUZY & BAAB, INC.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. .....

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioner,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit

The Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter "I.A.M."), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on March 4, 1975.

This petition is presented separately (as authorized by Rule 46), in support of the Petition for Writ of Certiorari, now pending before this Court, as No. 74-1378, styled *General Dynamics Corporation v. Equal Employment Opportunity Commission.*

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals,[1] not yet reported, appears in the Appendix hereto (App. p. A-1). It is based solely[2] upon the majority opinion of a divided Circuit Court panel in *EEOC v. Louisville & Nashville Ry. Co.*, 505 F.2d 610, in which there is pending a petition for certiorari docketed as No. 74-1294.

The Opinion of the District Court for the Northern District of Texas is reported at 382 F.Supp. 59, and appears in the Appendix hereto (Appendix, pp. A-5-21). The final judgment of the District Court dismissing the action appears in the Appendix hereto (App. p. A-21).

JURISDICTION

The judgment of the Court of Appeals was entered on March 4, 1975 (Appendix p. A-3). This petition for certiorari is being filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1] The Fifth Circuit panel in the instant case was, according to the practice in that Circuit "not free" to consider the issue in the instant case, ". . . for we can overrule Fifth Circuit cases only when we sit *en banc*," *U.S. v. Bailey*, 468 F.2d 652 at 668 (5th Cir. 1972).

[2] EEOC made no attempt before the Circuit Court to justify its position in the instant case, except to assert (Appellants Brief, p. 3):

> "This Court is required to follow the decision in *EEOC v. Louisville and Nashville Railroad* unless the decision is reversed by the Court *en banc*. See *United States v. Bailey*, 468 F.2d 652, 668 (5th Cir. 1972)."

QUESTION PRESENTED

Does §706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, [42 U.S.C. §2000e-5(f)(1) (1972)], permit the Equal Opportunity Commission to file suit without regard to any time limitations?

STATUTORY PROVISIONS INVOLVED

Sections 706 and 707(e) of the Civil Rights Act of 1964, as amended in 1972, 42 U.S.C. §2000e-5 and 6(e) are reproduced in the Appendix (App. pp. A-22-29).

STATEMENT OF THE CASE

Upon charges[3] filed at various times beginning in 1967 the EEOC filed an action in the United States District Court against General Dynamics, the I.A.M., and the several local unions which are parties to collective bargaining agreements with General Dynamics at its Fort Worth, Texas, facility. The suit claims violation of Title VII of the Civil Rights Act, as amended, in General Dynamics' alleged racial and sex discrimination. Injunctive and money damage relief is sought against General Dynamics, and the unions' collective bargaining agreements are sought to be altered.[4]

The EEOC's suit was filed in 1974, more than six years after the initial charge, and almost a year after the last of the charges.

The suit was dismissed on the ground that EEOC lacked the statutory power to bring the action, as it was filed more than 180 days after the filing of the charges.[5]

The Court of Appeals reversed and remanded with directions to reinstate the complaint. See notes 1 and 2, *supra*, p. 2.

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[3] No charge was ever filed against I.A.M., though later charges named an autonomous local union.

[4] EEOC advised the District Court (Memo Brief 4/5/75):

> "Plaintiff has joined each of these unions as a Defendant pursuant to Fed.R.Civ.P. 19(a)(2). The Complaint charges none of these unions with violations of Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. (Supp. II) § 2000e, *et seq.* (hereinafter "Title VII") but alleges that each has an interest relating to the subject of this law suit since each is currently a party to a collective bargaining agreement with Defendant General Dynamics Corporation . . . in granting 'such further relief as the Court deems necessary and proper,' this Court may need to enjoin these unions from the temporary and/or permanent enforcement of portions of their collective bargaining agreements with Defendant General Dynamics."

[5] Both General Dynamics and I.A.M. filed Motions to Dismiss. The District Court's opinion dismisses the entire suit on General Dynamics' Motion, without mentioning the similar motion filed by I.A.M.

REASONS FOR GRANTING THE WRIT

This case involves an important question of federal law which has not been, but should be, settled by this Court.

I

The negotiation and enforcement of collective bargaining agreements are at the core of the national labor policy.[4] The basic statute protecting and controlling these activities, in § 10(b),[5] precludes attack upon these agreements unless brought within six months of the execution of the agreement. This Court in *Local 1424, Intl. Assn. of Machinists v. NLRB*, 362 U.S. 411 (1960),[6] recognized and enforced the policies underlying this six month limitation, viz; 362 U.S. 411 at 419:

> "These policies are to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' HR Rep. No. 245, 80th Cong. 1st Sess., p. 40, and of course to stabilize existing bargaining relationships."

I.A.M.'s Motion sought dismissal "In that Plaintiff did not bring its suit within the time prescribed by § 706(f) (1) . . ." I.A.M. also raised failure to file charge against I.A.M., and failure to attempt conciliation. The District Court found it unnecessary to consider these latter issues, since the suit was dismissed on the limitation point. Cf. District Court's Opinion at ftnt. 2, 382 F.Supp. 59, at 60.

[4] See "Findings and Policies" in § 1 of the N.L.R.A., 49 Stat. 449 (1935) as amended 29 U.S.C. §§ 151-168 at § 151.

[5] 29 U.S.C. § 160 (b) provides: ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the [National Labor Relations] Board . . ."

[6] Compare *International Union v. Hoosier Cardinal*, 383 U.S. 696 (1966), where the question of timeliness of suits brought under § 301 of Taft-Hartley (29 U.S.C. § 185) to enforce collective bargaining contracts was recognized as of such importance as to warrant review here by certiorari.

The Court of Appeals' holding in the instant case is at war with these policies. It permits, without any time limitation, attack upon collective bargaining agreements which otherwise function "of course to stabilize existing bargaining relationships" *Ibid.* at 419. A charge more than six years stale is viewed as the foundation for efforts to redo long established bargaining patterns—though such charge was aimed only at the employer.

Not only is there no charge against this union, but litigation is permitted to proceed years after union administrations have been replaced;[9] and here, as in the cited case, long "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused."

2

The decision below likewise runs counter to the policies basic to the 1972 amendments to Title VII of the Civil Rights Act. Congressional concern that prompt resolution of civil rights complaints be effected is consistently reflected in the 1972 amendments.

Section 706(f)(1), § (e) requires that the aggrieved individual file his charge with the Commission within the 180 days after the alleged unlawful employment practice. Thereafter, during the first thirty days, conciliation is to be attempted by the Commission. Then, within the remaining 150 days, the Commission can file suit. If it does not do so, then the right to sue vests in the aggrieved individual who must sue within the 90 days after receiving notice from the Commission. If the Commission has not timely filed a suit itself, it then retains a limited right of intervention in such a private suit.

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[9] Landrum-Griffin requires periodic elections—at least every three years at the local union level, and every five years in International unions. See Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481, Title IV, § 401(a).

The time limitation is further reflected by subsection (b) emphasizing that the Commission shall, so far as practical, make its determination as to reasonable cause within 120 days after the filing of the charge and to conciliate if possible. In the event conciliation has not been effected within the 180 days and the Commission has filed suit, then the last sentence of subsection (f)(1) gives the Court the power to stay court proceedings for not more than 60 days pending further efforts of the Commission to obtain voluntary compliance.

Subsection (f)(2) permits appropriate temporary and preliminary relief pending final disposition of a charge. Subsection (f)(4) makes it the duty of the chief federal judge in the district in which the case is pending immediately to designate a judge in such district to hear and determine the case. Subsection (f)(5) provides that it should be the duty of the judge so designated to set for hearing at the earliest practicable date and to cause the case to be in every way expedited.

These statutory indications of intent to require prompt determination are ignored by the Court of Appeals.

More detailed analysis here of the Congressionally mandated enforcement procedures would unduly lengthen this petition. We refer this Court to Judge Moore's dissent in *EEOC v. Louisville & Nashville R. Co.*, 505 F.2d 610 at 617-620 (5th Cir. 1974; pending an application for certiorari, as No. 74-1294, and appearing in the Appendix hereto, App. pp. A-30-34), and to the District Court's careful analysis of the statutory scheme in the instant case, 382 F.Supp. 59-68 (N.D.Tex., 1974; App. pp. A-5-21, *infra*).

3

The Court of Appeals' disposition of this case aborts the conciliation process provided in the statute. Meaningful conciliation necessarily must occur within a known time frame. The statutory scheme initially envisions compliance through the process of conciliation; court action is to me instituted only after the con-

ciliation process has been tried. The pressure upon the Commission and the parties to engage in meaningful conciliation evaporates when charges lie forgotten for years. The Congress recognized as much in the thirty day provision in the initial sentence in §§(f)(1), and in the provision for private right to sue within short time limits appearing later in that sub-section. The statutory scheme envisions prompt conciliation, and that failing, a private suit in which the Commission may intervene if it wishes. It neither contemplates nor permits unlimited hiatus.

4

Finally, as noted in the District Court's opinion, "there are numerous district court opinions on the matter reflecting a clear split of authority," 382 F.Supp. 59 at 63, note 11 where the cases are collected. *General Dynamics*' petition for certiorari in the instant case displays the lengthy list of cases in which the lower courts have come to differing conclusions on this issue.[10] More recently, *EEOC v. Wilson & Co.*, 387 F.Supp. 1224 at 1226-1231 (D.C. Colo., 1975), collects the cases pro and con, notes the "clear split of authority", and dismisses for failure to file within the limitation period.

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[10] These are:

Cases holding a limitation:

EEOC v. Kimberly-Clark Corp., 380 F.Supp. 1106 (W.D.Tenn. 1974), *rev'd*, — F.2d —, 9 EPD ¶ 9752, 10 FEP Cases 38; *EEOC v. U.S. Pipe & Foundry*, 375 F.Supp. 237 (N.D.Ala. 1974); *EEOC v. Louisville & Nashville R.R. Co.*, 368 F.Supp. 633 (N.D.Ala. 1974); *rev'd* 505 F.2d 610; *EEOC v. Griffin Wheel*, 360 F.Supp. 424 (N.D.Ala. 1974); *EEOC v. Berman Bros.*, 7 EPD ¶ 9212, 8 FEP Cases 96 (N.D.Ala. 1974); *EEOC v. Cleveland Mills*, 364 F.Supp. 1235 (W.D.N.C. 1973), *rev'd* 502 F.2d 153 (4th Cir. 1974), *cert. denied*, — U.S. — (1975); *EEOC v. Birmingham Stove & Range Co.*, Civ. No. 730-M-201 (N.D.Ala. 1974); *EEOC v. General Dynamics Corp.*, 382 F.Supp 59 (N.D.Tex. 1974), *rev'd* — F.2d —.

Cases holding no limitation:

EEOC v. Louisville & Nashville R.R. Co., 505 F.2d 610 (5th Cir. 1974); *EEOC v. General Dynamics Corp.*, — F.2d — (5th

Additionally, thousands of labor unions administering collective bargaining agreements which are facially neutral and by which stability in labor relations is maintained, are in jeopardy of prohibitively expensive litigation based on stale charges (many of which are directed only at the employer) unless this court determines the issue.

The grant of certiorari, and reversal here will not impede compliance with the high purpose of the Civil Rights Employment legislation. *Current* racial or sex discrimination will remain subject to current charges, and prompt conciliation and court action as necessary within the statutory scheme. The dismissal of ancient charges which have been gathering dust through the years will indeed hasten the day when prompt attention can be given to correcting instances of current discrimination.

Cir. 1975); *EEOC v. Cleveland Mills*, 502 F.2d 153 (4th Cir. 1974); *cert. denied* — U.S. — (1975); *EEOC v. Kimberly-Clark Corp.*, —F.2d —, 9 EPD ¶ 9952, 10 FEP Cases 38 (6th Cir. 1975); *EEOC v. Bartender's Int'l Union*, 369 F.Supp. 827 (N.D.Cal. 1973); *EEOC v. Mobil Oil Corp.*, 362 F.Supp. 786 (W.D.Mo. 1973); *EEOC v. Duff Bros., Inc.*, 364 F.Supp. 405 (E.D.Tenn. 1973); *EEOC v. Eagle Iron Works*, 367 F.Supp. 817 (Iowa 1973); *EEOC v. Huttig Sash & Door*, 371 F.Supp. 848 (S.D.Ala. 1974); *EEOC v. U.S. Industries, Inc.*, 7 EPD ¶ 9295, 7 FEP Cases 171 (W.D.Tenn. 1974); *EEOC v. E. I. DuPont de Nemours & Co.*, 373 F.Supp. 1321 (Del. 1974); *EEOC v. Christiansburg Garment Co.*, 376 F.Supp. 1067 (W.D.Va. 1974); *EEOC v. Joint Apprenticeship Committee*, 7 EPD ¶ 9334 (N.D.Cal. 1974); *EEOC v. Rollins, Inc.*, 8 EPD ¶ 9557, 8 FEP Cases 492 (N.D.Ga. 1974); *EEOC v. Western Electric*, 382 F.Supp. 787 (Md. 1974); *EEOC v. Hickey-Mitchell Co.*, 372 F.Supp. 1117 (E.D.Mo. 1973); *EEOC v. Mississippi Federated Cooperative Services*, 8 FEP Cases 731 (S.D.Miss. 1974); *Patterson v. American Tobacco Co.*, 8 EPD ¶ 9722 (E.D.Va. 1974); *EEOC v. United Aircraft Corp.*, 383 F.Supp. 1313 (D.Conn. 1974); *EEOC v. Rexall Drug Co.*, 9 EPD ¶ 9936 (E.D.Mo. 1974).

CONCLUSION

Accordingly, a writ of certiorari should issue to review the judgment of the Fifth Circuit.

Respectfully submitted

L. N. D. WELLS, JR.
Suite 200—8204 Elmbrook Drive
Dallas, Texas 75247
(214) 630-3672

PLATO E. PAPPS
1300 Connecticut Avenue
Washington, D. C. 20006

Counsel for Petitioner, International Association of Machinists and Aerospace Workers, AFL-CIO

APPENDIX

Per Curiam Opinion of the Court of Appeals in This Case, Dated March 4, 1975

In the United States Court of Appeals
For the Fifth Circuit

No. 74-3633
Summary Calendar*

Equal Employment Opportunity Commission,
Plaintiff-Appellant,

vs.

General Dynamics Corporation, et al.,
Defendants-Appellees.

Appeal From the United States District Court
For the Northern District of Texas
(March 4, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM:

The sole issue in this case is whether the Equal Employment Opportunity Commission is barred from filing a suit under § 706(f)(1) more than 180 days after the filing with the Commission of the charges on which the suit is based.

In E.E.O.C. v. Louisville and Nashville Railroad Company, 5 Cir. 1974, 505 F.2d 610, Petition for Rehearing En Banc

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* Rule 18, 5 Cir.; *see* Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

denied January 30, 1975, we held that the passage of 180 days from the time the charge was filed with the Commission did not bar the Commission from filing suit to enforce the Act.

The judgment of the district court is reversed and the cause is remanded with directions to reinstate the complaint.

REVERSED and REMANDED
WITH DIRECTIONS

Judgment of the Court of Appeals in This Case, Dated March 4, 1975

United States Court of Appeals
For the Fifth Circuit

October Term, 1974

No. 74-3633
Summary Calendar

D. C. Docket No. CA-4-74-54

Equal Employment Opportunity Commission,
Plaintiff-Appellant,

versus

General Dynamics Corporation, et al.,
Defendants-Appellees.

Appeal From the United States District Court
For the Northern District of Texas

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court with directions to reinstate the complaint in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

March 4, 1975

Issued as Mandate:

Memorandum Order in Trial Court Dated August 15, 1974

In the United States District Court for the Northern District of Texas

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Civil Action No. CA-4-74-54

Equal Employment Opportunity Commission

v.

General Dynamics Corporation, et al.

MEMORANDUM ORDER

This case is before the Court on defendant, General Dynamic's motion to dismiss. The principal contention is that the Equal Employment Opportunity Commission[1] is precluded from maintaining this action because it failed to timely bring suit.[2] [3]

---

[1] Hereinafter, EEOC or Commission.

[2] General Dynamics raises two additional issues: (1) that EEOC failed to engage in good faith negotiations prior to bringing suit and is therefore barred and (2) that EEOC is barred for failure to give sufficient notice of failure to conciliate or inability to obtain voluntary compliance. 29 C.F.R., §§ 1601.23 and .25 (1973). The Court has not found it necessary to consider or decide such issues.

[3] General Dynamics urges that it is advancing a jurisdictional prerequisite of maintaining suit and not a statute of limitations matter. The Court believes it unnecessary to decide the semantical difficulty, and will refer to the issue as one involving limitations.

EEOC brought this suit pursuant to Title VII of the Civil Rights Act on February 25, 1974.[4]

EEOC is suing General Dynamics and the several unions which operate plant facilities at General Dynamics locations in Fort Worth and Waco, Texas. It alleges that charges were filed with the Commission more than thirty days prior to the institution of the suit, that the Commission had determined that reasonable causes existed to believe that defendants had engaged in unlawful employment practices, and that no conciliation agreement acceptable to it had been secured. It complains of systemic discrimination based upon race, sex and national origin vis a vis the employment opportunities of blacks, females, and Spanish-surnamed Americans. It alleges that such discrimination has occurred since July 1965 and has continued up to the present date. There is no dispute that more than one hundred eighty days has expired since the filing of the last charge with EEOC. Nor is there dispute that a right to sue notice was issued by the commission to various aggrieved parties and that this suit was brought prior to that notice.[5] Section 706(f)(1) of the act is reproduced in its complete complexity in the margin.[6] General Dynamics strongly contends that this

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[4] On May 9, 1974, individual claimants filed a class action against the same defendants in this cause alleging sex discrimination. (CA 4-74-125). They allege their suit was brought within ninety days after the giving of notice of a right to sue from EEOC. Defendants in that action have pending a motion to strike or for summary judgment on the basis that intervention is dictated by Title VII. Plaintiffs in that cause have accordingly brought alternative motions to consolidate or to intervene in the instant suit.

[5] 42 U.S.C. § 2000e-5 et seq.

[6] "(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission; the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political

section establishes a jurisdictional time frame in which EEOC must bring suit. The Commission's position is that the statute is merely enabling in nature and does not establish any limitations period or jurisdictional prerequisite to its filing suit, other than the expiration of thirty days from the date of a charge being filed with them and a subsequent inability to secure from the named respondent a conciliation agreement. It asserts that the Equal Employment Act of 1972, which gave the Commission the power to sue in its own right for the first time, should

subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance."

be understood as encompassing three distinct changes to the original legislation.[7] Initially, says EEOC, the first sentence should be perceived, apart from the remainder of 706(f)(1), as empowering the Commission to sue, subject only to charge being filed, thirty days elapsing and an inability to secure a conciliation agreement. Next, EEOC would direct attention to the enlargement of the time period for conciliation efforts to continue, without any individual claimants being empowered to sue, from thirty days to one hundred eighty days from the date of the charge being filed. The last change, EEOC advances, enlarges the period during which an individual claimant can sue, after he has received notice, from thirty to ninety days. It is within this context that EEOC interprets § 706(f)(1). In other words, the elapse of one hundred eighty days is to be seen as a condition precedent to any suit which an individual claimant might bring and not as affecting EEOC in any way.

General Dynamics' approach to 706(f)(1) is to consider it as a complete unit and view it as creating a new right, distinct and apart from any known at common law and therefore to be construed accordingly.[8]

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[7] 42 U.S.C. § 2000-5 (1964), established the Commission as a persuasive and conciliation agency, with no enforcement powers as such.

[8] This type argument has met with favor in interpretations of the more explicit language regarding the right to sue of individual claimants. *Cf. Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973). A pure expression of this position is found in *Simon v. United States*, 244 F.2d 703, 705 (5th Cir. 1957) (quoting 34 Am. Jur. § 7, pp. 16-17).

> "A Statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commencerd, is not a statute of limitations. It is a statute of creation and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and

These respective readings of 706(f)(1) oversimply the limitations question. *See, Guerra v. Manchester Terminal Corporation, Civil No. 73-1907* (5th Cir. July 31, 1974); *United States v. Georgia Power Co.*, 474 F.2d 906, 922-24 (5th Cir. 1973). The issue is not as EEOC suggests, a matter of finding in Title VII a boundless right to sue for the Commission because there is merely oblique language concerning the extent of its powers. The whispered commands of Congress must be followed just as certainly as those more clearly articulated.[9] Nor is following General Dynamics' position of applying the limitation period of one hundred eighty days, which is the inception of the individual claimants power to sue, as a strict foreclosure of the Commission's power to sue, a simple endeavor.[10] There is no quarrel with General Dynamics' position that where ". . . rights asserted in a court are statutory in nature, compliance with the

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the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. * * *"

[9] The Commission's argument in this regard is that Congress knew how to frame a clear cut limitations period, and in fact did so vis a vis the individual claimant. Therefore the omission of such language in this instance is evidence of Congressional intent that EEOC's right to sue is limitless. Such reasoning ignores the overall pattern found in 706(f)(1) as well as the developed jurisprudence encompassing the individual's right to sue, *See e. g., Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (an aggrieved party's claim to be construed broadly).

[10] *See, e.g., EEOC v. Duff Bros., Inc.*, 364 F.Supp. 405 (E.D. Tenn. 1973) (no language in Act that could properly be interpreted as a limitation; contrary to legislative purposes of 1972 amendments); *EEOC v. Mobil Oil Corp.*, 362 F.Supp. 786 (W.D.Mo. 1973) (defendant's interpretation patently frivolous; no final time within which EEOC must sue); *EEOC v. Bartenders Intern'l.*, 369 F.Supp. 827 (N.D.Calif. 1973) (180 day period is only a period in which private party must wait; does not define period in which EEOC must sue); *EEOC v. Eagle Iron Works*, 367 F.Supp. 817 (S.D.Io. 1973) (defendant's position requires a tortuous reading of the Act and ignores legislative history).

statute is a prerequisite to the commencement of a civil action based thereon . . . ." *Miller v. International Paper Co.*, 408 F.2d 283, 286 (5th Cir. 1969). As observed in *Miller, supra*, however, this begs the question and leaves this Court with the task of determining the prerequisites found in that statute, even though courts have recognized that Title VII rights are novel and independent creations of Congress. *Alexander v. Gardner-Denver Co.*, — U.S. —, 39 L.Ed. 147, 159 (1974); *Dent v. St. Louis-San Francisco Ry.*, 406 F.2d 399, 403 (5th Cir. 1969). The Fifth Circuit in addressing the issue of when a claimant's right to sue matured under the 1964 version of Title VII noted that confusion there stemmed from the inclusion in the pertinent section of ". . . both a time limitation on the conciliation efforts of the EEOC and a time limitation on the charging party's right to file suit." *Miller, supra*, at 286. There is a similar confusion in the present version of the Act. Here, however, we deal not with the rights of an individual claimant, but rather the rights of the Commission. It is one matter to show solicitude for individuals, whose rights are paramount. With individual claimants in Title VII cases, courts do not deal with

> ". . . businessmen-plaintiffs or plaintiffs accustomed to consulting lawyers about their rights. This law is a remedial one, and the Congressional purpose would not be furthered by making plaintiffs of the kind with which we are concerned, members of the working class who are generally without substantial higher education, dot every 'i' and cross every 't' on their way to the courthouse." *Antonopulos v. Aerojet-General Corp.*, 295 F.Supp. 1390, 1395 (E.D. Cal. 1968).

Can this same reasoning apply to the Commission with equal vitality? I think not.

This Court is well aware that it does not write on a blank slate in facing this particularly obscure statute. There are nu-

merous district court opinions on the matter reflecting a clear split of authority.[11] Because of this division, the closeness of the question, and the well reasoned opinions on both sides of the issue, I have no doubt but that appellate review is imperative. This is really a matter for the Congress to decide. The lights of Congressional intent shine dim on this section. Support for either position may be found in the legislative history. *See e.g., EEOC v. Union Oil Co., supra* (arguments pro and con presented with excerpts from Congressional Record). Our American practice of inspecting legislative history for Congressional intent demonstrates its inherent limitations in such cases. Legislation by its very nature is a compromise of competing interest. *Compare*, the English experience where only the words of the Acts themselves may be considered. I, too, agree that the problem here is a typical instance of statutory construction:

> "The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended

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[11] As of the date of the hearing, two district courts have sustained the limitations argument; five have sustained EEOC's position. Holding that a one hundred eighty day bar does exist are: *EEOC v. Cleveland Mills Co.*, 364 F.Supp. 1235 (W.D.N.C. 1973); *EEOC v. Griffin Wheel*, 360 F.Supp. 424 (N.D.Ala. 1974); *EEOC v. Louisville & Nashville R.R.*, 368 F.Supp. 633 (N.D.Ala. 1974); *EEOC v. Union Oil Co.*, 369 F.Supp. 579 (N.D.Ala. 1974). Holding that there is no such bar are: *EEOC v. Duff Brothers, Inc.*, 364 F.Supp. 405 (E.D.Tenn. 1973); *EEOC v. Mobil Oil Corp.*, 362 F.Supp. 786 (W.D.Mo. 1973); *EEOC v. Bartenders International Union, Local 41*, 369 F.Supp. 827 (N.D.Cal. 1973); *EEOC v. Huttig Sash and Door Company*, 371 F.Supp. 848 (S.D.Ala. 1974); *EEOC v. E. I. DuPont de Nemours & Co.*, 373 F.Supp. 1321, 1330 (D.Del. 1974) (I disagree that there are only scattered remarks supporting the limitations position. Senator Dominick's views are particularly germane if only because it was his amendment which substituted court enforcement procedures for the administrative cease and desist procedures and also contained the provisions for intervention powers.)

on a point not present to its mind, if the point had been present." Gray, The Nature and Sources of the Law, § 370 at 165 (1948) cited in *Miller v. International Paper Co.*, 408 F.2d 283, 287 (5th Cir. 1969).

If there is no finality to the time when EEOC can bring suit against named respondents, the Court believes that the broad underlying policy of Title VII of encouraging adjustment and settlement of employment discrimination complaints outside of litigation would be frustrated. Enforcement through litigation is only one aspect of the Commission's responsibilities. EEOC is also, and perhaps primarily, an administrative body with a developing expertise in problems of employment discrimination. Conciliation by EEOC was originally intended to and still does, even after the 1972 Amendments, play an important role in the legislative scheme. *Beverly v. Lone Star Lead Construction Corporation*, 437 F.2d 1136, 1139 (5th Cir. 1971); *Caldwell v. National Brewing Co.*, 443 F.2d 1044, 1046 (5th Cir. 1971) (citing with approval *Young v. International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971), and recommending in another context that the district court accord due regard to the conciliatory policy which is at the heart of Title VII). Under the present scheme envisioned by Title VII, I have no difficulty in holding the Commission to the same standards as courts have held individual complainants. I can find no indication that Congress intended to abandon the clear policy of deferring action in federal court until a charge has been filed with the Commisison and an opportunity given the Commission to effect conciliation, if possible. *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 985-87 (D.C. Cir. 1973). If Congress had chosen to accord the Commission unlimited rights of suit while giving to individual claimants only a limited right, then, I believe it would have done so explicitly. It is consistent with the Congressional scheme of deferring to the agency's conciliation efforts to have a jurisdictional time within which the Commission must sue, just as it is consistent for there to

be such a time within which individual claimants must do so. That time for individual claimants is within ninety days after the Commission has given them notice of their right to sue. That time for EEOC is from after the thirtieth day a charge is filed until the expiration of one hundred eighty days.

This Court agrees that the most reliable sources of guidance in this matter are ". . . the language of the amendment itself, the section by section analysis of the amendment submitted by the Joint Conference Committee, and finally, the well documented Congressional awareness of both the EEOC's experience under the original version of Title VII and of the capability which the EEOC could be expected to possess under the 1972 Amendments. . . ." *EEOC v. E. I. DuPont de Nemours & Co.*, 373 F.Supp. 1321, 1327 (D.Del. 1974). Additionally, the Court looks to the broad Congressional purposes underlying Title VII: First, that the social disaster of racial and sex discrimination in employment opportunity be eliminated, and second, that prompt and effective methods be enacted to accomplish this goal. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). Based on these principles and guided by the above mentioned sources, this Court concludes that the Congressional scheme did envision a complete bar to a Commission suit after the lapse of one hundred eighty days. There is a jurisdictional prerequisite to an individual claimant's power to sue; likewise, it is contemplated that suits by the Commission should be timely. I conclude that limitations begin to run as to the Commission after the thirtieth day from the filing of the charge and that such period extends until the one hundred eightieth day. At that time the Commission's power to sue *eo nomine*, constricts. From that point forward, the Commission is limited to conciliation or intervention where appropriate.

As originally enacted, Title VII provided no powers to EEOC other than those of conciliation. The Commission's role was to

seek voluntary compliance. It had no independent powers of enforcement.[12] Enforcement of Title VII was placed exclusively in the hands of individual claimants.[13] The 1972 amendments, on their face, and as evidenced by the legislative history, reflects the consensus that private enforcement of Title VII as an exclusive approach, had proven inadequate and that a broadening of method was necessary to accomplish the worthy aims of the Act.[14] EEOC's analysis of the changes the 1972 Act effected is a helpful comparison of the original act and the amended 1972 version. That is:

1. The Commission was empowered to sue;

2. The Commission's time for exclusive action was enlarged from thirty to one hundred eighty days. Since the 1972 amendments, the Commission is the sole entity with power to conciliate, sue or dismiss the charges. Prior to 1972 it could only conciliate or dismiss;

3. The duration of the individual claimants right to sue is enlarged from thirty to ninety days;[15]

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[12] The Attorney General was permitted to file suit in so-called "pattern or practice" discrimination suits. 42 U.S.C. § 2000a-5 (1970).

[13] The Supreme Court's teaching has settled any questions as to the nature of civil rights actions. ". . . when the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. A Title II suit is thus private in form only . . . (a plaintiff sues) . . . not for himself alone but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority . . ." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 19 L.Ed. 2d 1263, 1265 (1968). (footnotes omitted).

[14] *See*, 1972 U.S. Code & Ad. News, 2139-41. This is one instance of where the legislative history is valuable. There was little disagreement on whether EEOC would be given enforcement powers. The controversy was over the mode of such powers, i.e., whether EEOC would be given administrative cease and desist type authority or the judicial enforcement approach.

[15] This ninety day period has been properly found to be a jurisdictional prerequisite to maintaining suit and strict compliance is demanded. *Genovese v. Shell Oil Co.*, 488 F.2d 84 (5th Cir. 1973).

4. Cross rights of intervention are allowed with the significant distinction that individual claimants are given this right absolutely while the EEOC is limited to permissive intervention.

The difficulty this Court finds with this approach alone, however, is its isolation of each change as opposed to viewing the section as an integrated whole.[16] To examine each salutory change effected by the 1972 Act without regard to its affect on the other portions of Title VII and especially § 706(f)(1), is to be shortsighted. As previously noted, the main theme underlying Title VII is that prompt methods be established to eliminate racial and sex discrimination in employment opportunity. I find that to accept EEOC's position on this issue would be to disregard this oft stated purpose of the Act, and to ignore the strong tradition of individual enforcement of Title VII which has developed. While the 1972 Amendment to Title VII did vest EEOC with its own independent power to sue, ". . . the private right of action remains an essential means of obtaining judicial enforcement of Title VII." *Alexander v. Gardner-Denver Co.*, . . . U.S. . . ., 39 L.Ed.2d 147, 156 (1974); *Jen-*

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[16] The Court finds the language of § 706(f)(1) extremely awkward. A reading of the pertinent parts alone is helpful to emphasize the point that the section is a unified whole. *Compare*, the essential parts of § 706(f)(1):

> "(f)(1) If within thirty days after a charge is filed . . ., the Commission has been unable to secure from the respondent a conciliation agreement . . ., the Commission may bring a civil action against any respondent not a government . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . (I)f within one hundred and eighty (sic) days from the filing of such charge . . ., the Commission has not filed a civil action under this section, . . ., or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . Upon timely application, the Court may, in its discretion, permit the Commission, . . . to intervene in such civil action upon certification that the case is of general public importance . . .", with the provision as a whole, footnote 5, *supra*.

kins v. United Gas Corp., 400 F.2d 28, 32 (5th Cir. 1968). In this context then, why would EEOC be given an unlimited time in which to decide whether to conciliate further, sue, or dismiss a complaint, when the rights of the individual are paramount? *See*, 118 Cong. Rec. H1863 (Mar. 8, 1972). This Court believes that prompt action on individual complaints is an essential part of the Title VII scheme. EEOC argues that a one hundred eighty day period is just too short. Not enough time they say, to properly investigate claims, especially where a respondent feigns cooperation in a ploy to allow limitations to run. If this occasion arises, EEOC could always timely file their suit while continuing the conciliation process. Settlements between litigants are the rule and not the exception. No purpose is served by allowing stale damoclean claims to persist.[17] If there is an on-going practice of prohibited discriminnation new charges will present themselves either by individual claimants or by the Commissioner.[18]

In the instant suit, EEOC is relying in part on charges of discrimination nearly seven years old. A good many of the charges were filed over three years ago. The latest charge was filed in February 1973.[19] In such a situation, there is simply no need for the Commission to predicate their suit on stale charges. There is no purpose served by such a practice. Where an on-going practice of discrimination exists the Commission certainly

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[17] The Commission's argument that a limitations period would frustrate conciliation is not persuasive. Knowledge that there is a definite time in which to conciliate or be subject to a Commission suit may be in itself an incentive to conciliate.

[18] 42 U.S.C. § 2000e-5(a) The original act permitted charges to be filed by "a person claiming to be aggrieved" or by a member of the Commission where there was reasonable cause that a violation had occurred. 42 U.S.C. § 2000e-5(a) (1970). The 1972 Amendments allow charges to be filed on behalf of a person claiming to be aggrieved. *See* Sape and Hart, *Title VII Reconsidered: The Equal Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 864 (1972).

[19] Plaintiff's answers to interrogatories filed May 13, 1974.

can determine "reasonable cause" of any such violations and institute their own charges.

The 1972 Amendments provided for additional and cumulative remedies for the scourge of employment discrimination. One such new remedy was the independent right of the Commission to sue. But this right was not created in a vacuum. It was explicitly established in 706(f)(1); the enforcement provision which previously had empowered only individuals to sue. Contained in that section is a carefully measured sequence in which particular actions are invoked. It is in this considered measuring out of powers that the Court finds one more support for its conclusion that there is a specified duration to the Commission's right to sue.[20] That duration is from after the thirtieth day from the filing of a charge to the expiration of one hundred eighty days from such filing. It is plain that the initial thirty days from the date a complaint is filed is intended for conciliation only. The next one hundred fifty days is also for conciliation but here the Commission has enforcement powers: power to bring suit. During this time EEOC is the exclusive vehicle through which Congress intended Title VII to function. EEOC is not restrained in any way in the conciliation process or in its ability to sue. The individual claimant must wait while EEOC proceeds during this time. It is only after one hundred eighty days from the time the charge was filed, i.e., six months, that an individual claimant's right to sue may mature. It is significant that it is not the mere lapse of time which is the wellspring of an aggrieved party's right to sue, but rather the giving of notice by the Com-

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[20] *Cf. Alexander v. Gardner-Denver Co.*, — U.S. —, 39 L.Ed. 2d 146, 157 (1974). The Supreme Court, in discussing the plenary powers with which the federal courts are vested to enforce Title VII, says: ". . . it [Title VII], specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. . . ." These jurisdictional prerequisites are (1) filing timely charges of employment discrimination with the Commission and (2) by receiving and acting upon the Commission's statutory notice of the right to sue. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.Ed. 2d 668, 675-76 (1973).

mission. *Miller v. International Paper Co.*, 408 F.2d 283, 287 (5th Cir. 1969); *Cunningham v. Litton Industries*, 413 F.2d 887, 890 (9th Cir. 1969). 29 C.F.R. § 1601.25b provides that the statutory notice will not issue from the Commission even after the expiration of one hundred eighty days unless a "reasonable cause" determination has been made *or* unless a written demand is made by the aggrieved party or a member of the class aggrieved. The Commission correctly notes in this regulation that notice does not terminate the Commission's jurisdiction of the proceedings at issue and that processing shall continue. This regulation is in tune with the conciliatory policy which is at the heart of Title VII. Before such notice is given, the individual awaits Commission action: conciliate or dismiss the charge. For five months Commission action could include a lawsuit. In all cases the individual must wait six months from the date he files his charge before he may even make demand for his notice. In this case, individuals waited from approximately one to nearly seven years before notice issued from EEOC. The Commission always holds the key to the courthouse. If the Commission does believe that a lawsuit is appropriate then certainly that determination can be made within six months after a charge is filed. If one is not brought by the Commission, then its power constricts to that of conciliation bolstered however by its ability to always empower individual claimants to sue. It is significant that the nature of such individual suits is nearly always one appropriate for class relief. *Jenkins v. United Gas Corporation*, 400 F.2d 28 (5th Cir. 1968). 29 C.F.R. 1601.25b provides ample protection to the Commission's interest in conciliation. If its efforts have been unavailing, and individual claimants have made written demand for their notice, then it is not unreasonable to assume that individual suits are imminent. In such an event, it is clear that the Commission's powers enlarge once again by their own action in giving individual claimants notice of their right to sue. This enlarged power is the right of permissive intervention upon certification that the case is one of general public importance. In all cases, however, the Com-

mission will have full notice of the fact that its power will constrict and can act accordingly if it so chooses. There is no frustration of the Congressional purpose in giving EEOC powers to sue as the Commission argues. Interpreting Section 706(f)(1) and 29 C.F.R. § 1601.25b to delineate a definite time frame for EEOC would tend to expedite rather than frustrate Congressional policy. If the Commission chooses to sue before the one hundred eighty days expires, then the individual may yet get to the courthouse through his absolute right of intervention. This is consistent with Congressional policy. After this time expires and once notice is given to an individual claimant, however, either on the Commission's own initiative or upon written demand, then I conclude, it is such a claimant alone who takes on the mantel of the sovereign to vindicate a policy of highest priority.[21] *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 19 L.Ed. 2d 1263 (1968); *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968). The Commission's power is not extinguished but rather enlarged at that time. It may still proceed at conciliation or it may now seek to intervene in any suit which is brought by an individual claimant. In the instant litigation the most recent charge was pending for nearly a year prior to suit. Most of the charges as previously noted were pending, not six months but more nearly twenty-four months or longer.

The Court is mindful that in the civil rights area broad, cumulative and overlapping remedies are common.[22] I do not feel,

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[21] This position is not unfamiliar to the Commission. Apparently it was urged at one time by EEOC itself. ". . . *The Commission admits that it has no power to institute an action during the ninety day period in which the aggrieved party has the exclusive right to sue.* However, it contends that the power to institute action reverts if the aggrieved has not filed suit. This Court does not interpret the statute as granting such power." EEOC v. Cleveland Mills Co., 364 F.Supp. 1235, 1238 (W.D.N.C. 1973) (emphasis supplied); *Cf. EEOC v. Missouri Pac. R.R.*, 493 F.2d 71 (8th Cir. 1974).

[22] See *Alexander v. Gardner-Denver Co.*, —U.S. —, 39 L.Ed. 2d 147, 158 (1974) (holding that prior processing of claims under col-

however, that the instant holding is in any way, inconsistent with this objective. In fact, it advances it. Congress recognized that in instances where litigation is necessary, duplicitous lawsuits are anathema. *Equal Employment Opportunity Commission v. Missouri Pacific R.R.*, 493 F.2d 71, 74 (8th Cir. 1974); *Crump v. Wagner Electric Co.*, 369 F. Supp. 637 (E.D. Mos. 1973); 1972 U.S. Code Cong. & Ad.News at 2148. This is the purpose of allowing cross rights on intervention. This Court must give maximum effect to the full text of Title VII, and to permit EEOC to have unlimited time within which to sue, would be to frustrate the purpose of protecting individual claimants. The developed law in this area is replete with instances where courts have refused to penalize individual claimants in employment discrimination cases for the acts of the Commission. *Veazie v. Southern Greyhound Lines*, 374 F.Supp. 811, 814 (E.D. La. 1974) (citing authorities). Allowing the Commission to sue during the time when the individual claimant is so empowered, would force him into a race to the courthouse with EEOC, lest he be relegated to intervention and involvement in protracted and more complex litigation.[23] [24] It is beyond dispute that an

lective bargaining agreement not a bar to a Title VII action and observing that under Title VII "several forums" are provided for consideration of employment discrimination claims.

[23] EEOC's argument that the policy of the public interest in seeing employment discrimination eliminated is best served by Commission lawsuits, neglects the fact that Title VII suits are by their very nature class actions and that this public policy has been consistently served in this manner. *Jenkins v. United Gas Corp.*, 400 F.2d 28, 32-33 (5th Cir. 1968); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968).

[24] Other approaches to the problem of duplicitous lawsuits have been considered by other courts. *See e.g., EEOC v. Huttig Sash & Door Co.*, 371 F.Supp. 848 (S.D.Ala. 1974); *Crump v. Wagner Elec. Co.*, 369 F.Supp. 637 (E.D.Mo. 1974); *EEOC v. Cronin*, 370 F.Supp. 579 (E.D.Mo. 1973). In *EEOC v. Missouri Pac. R.R.*, 493 F.2d 71 (8th Cir. 1974), the Court held that powers of suit reside in both EEOC and individual claimants after the giving of notice, and that the power of either diminishes the rights of intervention once suit has been filed by the other. I find this view unpersuasive because it leaves unresolved the question of whether the Commission's right to sue ever terminates.

individual claimant in Title VII cases is not to suffer because of delays caused by EEOC.

Accordingly, because the Commission has not brought their suit within one hundred eighty days from the date when any claim which is the basis of this lawsuit was filed, I conclude that it was not timely brought and must be and is dismissed.

It is so ORDERED.

Entered this 15 day of August, 1974.

/s/ ELDON B. MAHON
United States District Judge

In the United States District Court for the
Northern District of Texas
Fort Worth Division

Equal Employment Opportunity Commission vs. General Dynamics Corporation, Et Al.	Civil Action No. CA 4-74-54

FINAL JUDGMENT

This action came on for hearing before the Court, Honorable Eldon B. Mahon, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged

That the plaintiff take nothing and that the action be dismissed on the merits, and that each party in this action bear its own costs.

Entered this 9th day of October, 1974.

JOSEPH McELROY, JR.
United States District Clerk
By: /s/ ELIZABETH BRUCKER
Deputy

Section 706 of Title VII of the Civil Rights Act of 1964, as Amended in 1972 (42 U.S.C. § 2000e-5)

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in sections 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charges; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practices) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the

Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charge with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local

authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

Same; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

Time for filing charges; time for service of notice of charge on respondent; filing of charge by Commission with State or local agency

(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a con-

ciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely

application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of

sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back

pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Section 707 of Title VII of the Civil Rights Act of 1964, as Amended in 1972 [42 U.S.C. § 2000e-6(e)]

Investigation and action by Commission pursuant to filing of charge of discrimination; procedure

(e) Subsequent to March 24, 1972, the Commission shall have authority to investigate and act on a charge of a pattern or practice of discrimination, whether filed by or on behalf of a person claiming to be aggrieved or by a member of the Commission. All such actions shall be conducted in accordance with the procedures set forth in section 2000e-5 of this title.

Pub.L. 88-352, Title VII. § 707, July 2, 1964, 78 Stat. 261; Pub.L. 92-261, § 5, Mar. 24, 1972, 86 Stat. 107.

Dissenting Opinion of Circuit Judge Moore in EEOC v. Louisville & Nashville R. Co., 505 F.2d 610 at 617

MOORE, Circuit Judge (dissenting):

I dissent.

The main question in this case is whether section 706(f)(1) of Title VII of the Civil Rights Act of 1964, as amended, [42 U.S.C. § 2000e-5(f)(1)] imposes a 180-day durational limit on the right of the Equal Employment Opportunity Commission to institute judicial proceedings for the redress of allegedly unlawful employment discrimination. The issue has caused a split in judicial opinion which is perhaps sharper than usual, indicating that the often elusive Congressional intent is in this case particularly obscure. In terms of sheer numbers the weight of judicial authority holds that section 706(f)(1) sets no time limitation on the right of the Commission to sue.[1] Fortunately, however, it is the persuasiveness of judicial reasoning and not the force of numbers which is of prime importance in our system. And although the question is admittedly not entirely clear, I am personally convinced that those courts holding that section 706(f)(1) does indeed impose a 180-day limit have properly interpreted the statute.

As the majority acknowledges, it is possible to cite portions of the legislative history which support either position.[2] Thus, I do not feel that this referent is particularly helpful in this instance. Rather, the language of section 706(f)(1) must be read and interpreted with a view toward the broad Congressional purposes underlying Title VII—that prompt, efficient methods be enacted and utilized to eradiate racial and sex dis-

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[1] See cases cited in footnote 1 of the majority opinion.

[2] See EEOC v. Union Oil Co. of California, 369 F.Supp. 579, 580-584 (N.D.Ala.1974), where the court summarized the arguments, pro and con, regarding the 180-day limit and cited pertinent portions of the legislative history.

crimination in employment. *See, e.g.*, EEOC v. General Dynamics Corp., No. CA 4-74-54, 382 F.Supp. 59 (N.D.Tex., 1974). In my view, affording the Commission a right to sue which is without a definite limit is anathema to that goal.

The United States Court of Appeals for the Eighth Circuit recently summarized the procedure established by the 1972 amendments to Title VII and particularly by section 706(f)(1).

1. A charge must be filed within 180 days after the occurrence of an alleged unlawful employment practice.

2. If the Commission finds reasonable cause to believe that the charge is true, and conciliation attempts prove unsuccessful, the Commission may bring suit against the respondent within 180 days of the filing of the charge. The charging party shall have the right to intervene in the Commission's suit.

3. If the Commission fails to file an action within 180 days, it shall notify the charging party.

4. Within 90 days after receipt of notice, the charging party may bring a civil action against the respondent. Should a private action be brought, the Commission may intervene, in the discretion of the court, upon certification that the case is of general public importance.

EEOC v. Missouri Pacific R. R., 493 F.2d 71, 74 (8th Cir. 1974). On its face this is an orderly procedure which for 30 days gives the Commission an opportunity to investigate and seek conciliation, for 150 additional days affords the Commission the right to sue while at the same time seeking an accommodation with the employer, and finally, after 180 days, grants the aggrieved individual a right of action for 90 days. Yet the Commission asserts that its authority to sue continues beyond the 180-day mark when the private right of action accrues. Reading the statute otherwise would, according to the Commission, unduly hamper the performance of its task, since 180

days is insufficient time to negotiate with the alleged violator. Moreover, the necessity of filing a suit to meet the 180-day deadline would assertedly interfere with conciliation efforts.

There is no doubt that Congress was well aware of both the average time necessary to process complaints and of the backlog which was confronting the Commission at the time of the 1972 amendments.[3] But to conclude that Congress could therefore not have intended to impose a time limit on the Commission seems to me erroneous.[4] A stronger inference is that Congress intended to expedite the administrative process and to eliminate the interminable delays which had previously been the rule. The entire thrust of section 706(f)(1) is toward increased efficiency. Starting with the filing of the charge, Congress set up a timetable—30 days for pure conciliation, 180 days for further negotiations before a right to sue letter issues to the private individual, 90 days in which the aggrieved party can bring suit. Congress clearly contemplated that the conciliation process would begin almost immediately and that serious efforts would be made before the individual was given the right to sue privately. To hold that the Commission has an open-ended period in which it may bring an action seems calculated to encourage delays and to undermine conciliation efforts. It is well-known that an imminent deadline, and in particular the pendency of a lawsuit, is apt to make even the most hard-line bargainers soften their position. Thus, a 180-day limit on the

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[3] See House Report No. 92-238, 92d Cong. 1st Sess. 3-5, 12 (1971), Senate Report No. 92-415, 92d Cong. 1st Sess. 5-6, 87 (1971); 1972 U.S. Code Cong. & Admin. News 2137, 2139-2143.

[4] Apparently no court has yet dealt with the problem of whether suits based on charges already pending before the Commission for over 180 days at the time of the 1972 amendments are foreclosed. This case does not present the issue, since the charge here was filed after the amendments. In view of the fact that the amendments were made applicable to already pending cases, however, it would not be an unreasonable position that in these cases the 180-day period began running from the date of the amendments and not the date of filing of the charges.

Commission's right to sue seems likely to promote settlements. And merely because the 180th day comes and a suit is filed does not mean that talks must terminate. Nothing prohibits the settlement of a pending lawsuit, and in fact section 706(f)(1) explicitly refers to the possibility of settlement by giving the district court discretion to stay proceedings for 60 days while the Commission makes further efforts to achieve voluntary compliance.

Further supporting a reading of the statute which imposes a 180-day limit on the Commission is avoidance of duplicative lawsuits. If the Commission's right to bring judicial proceedings is not cut off when the right of the individual starts, there is a significant chance that two lawsuits will be pending which deal with substantially identical issues.[5] Various courts have dealt with this problem[6] and solutions other than reading the statute as imposing 180-day limit are available. It would be possible to hold, for example, that the Commission's right to sue terminates only when an individual actually starts proceedings. The Commission itself has suggested that it may not bring an action during the 90-day period in which the aggrieved individual has the right to sue, but that its right revives upon the expiration of the 90-day period if the individual has taken no

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[5] It is clear that when Congress was considering the alternative course of giving the EEOC power to issue cease and desist orders, avoidance of duplicate proceedings was of major concern. *E.g.*, House Report No. 92-238, 92d Cong. 1st Sess. (1971), U.S. Code Cong. & Admin. News 1972, p. 2137. Although the same concern does not appear expressly after the cease and desist proposal was dropped in favor of allowing the Commission to seek pretrial enforcement, there is no reason why the problem of duplicative proceedings is just as significant when they are both judicial in nature.

[6] See EEOC v. Missouri Pac. R. R., 493 F. 2d 71 (8th Cir. 1974); EEOC v. Huttig Sash & Door Co., 371 F.Supp. 848 (S.D. Ala. 1974); EEOC v. Cronin, 370 F.Supp. 579 (E.D.Mo. 1973); EEOC v. Union Oil Co. of California, 369 F.Supp. 579 (N.D.Ala. 1974).

action.[7] Either of these alternatives tortures the language of the statute when a simple, straightforward reading obviates the necessity of making such semantic contortions.

I do not dispute that the 1972 amendments made the Commission the prime enforcer of Title VII rights, but a 180-day limit seems in no way inconsistent with that goal. The Commission is given first crack at enforcement for a period of six months. And even when the right of action accrues to the individual, the Commission retains a limited right of intervention when a case is of public importance. This role is undeniably substantial, and I am not convinced that Congress intended to enlarge it by granting an unlimited right to sue, for this right will, I believe, tend to undercut the effectiveness of the Commission as the first line of enforcement.

Accordingly, I would affirm the dismissal of the suit.

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[7] EEOC v. Cleveland Mills Co.,364 F.Supp. 1235, 1238 (W.D. N.C. 1973), rev'd., No. 73-2298, 502 F.2d 153 (4th Cir. 1974).